Commission must, when contemplating a referral, take into consideration the Court of Appeal's conservative approach to granting leave out of time (Criminal Appeal Act 1968, s. 16C). Accordingly, the Court of Appeal will probably not be kept busy for long following *Jogee*. Indeed, the avoidance of a tide of appeals based on a change in the law is what motivates the courts' approach to "substantial injustice". The practical need to balance securing individual justice for defendants and "finality and certainty in the administration of criminal justice" has been stressed repeatedly (*Cottrell* [2008] 1 Cr. App. R. 107, [42]). *Johnson* also prizes the ability of the appellate courts to change (or "correct") the criminal law without fear of overwhelming the appellate system (at [18]). These practical concerns (which may be alleged to miss the point, particularly when the claim is that the law was wrongly applied since 1984) motivated the Supreme Court and Privy Council in *Jogee* to sound a warning shot across the bows of potential defendants (at [100]). *Johnson* fires another. (Defendants in Northern Ireland have received their own: *Skinner et al.* [2016] NICA 40.)

The broad approach to conditional intention in *Johnson* allowed the Court to avoid real engagement with the injustice at the heart of its bifurcated approach. Regardless of one's views on whether *Jogee* was correct to kill off PAL, the difference in sentencing (and labelling) between murder and manslaughter is vast. The sole concern in murder cases (whether in in-time or in out-of-time appeals) should be whether *Jogee* might plausibly have resulted in a conviction for manslaughter. This unified approach would reach a more appropriate balance between finality and individual justice. The Court's approach to conditional intention also allowed it to avoid a connected issue: whether the statements regarding manslaughter in *Jogee* were correct. If the defendant intended to assist or encourage an attack causing actual bodily harm (or a non-violent offence), and the principal killed the victim in an attack intended to cause GBH (or worse), did the defendant intentionally assist or encourage the act that caused death? If not, on what basis is the defendant liable for manslaughter (see Simester (2017) 133 L.Q.R. 73, 86)? The difference between murder and manslaughter is marked, but it is nothing compared to the difference between murder and no liability for homicide.

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ACCESSORY LIABILITY: PERSISTING IN ERROR

IN *Miller v The Queen* [2016] HCA 30, the High Court of Australia (HCA) declined to follow the Privy Council and UK Supreme Court (UKSC) in abolishing the doctrine of extended joint criminal enterprise, as PAL is

known in South Australia. Under the Australian doctrine, liability for murder is imposed where an individual "is a party to an agreement to commit a crime and foresees that death or really serious bodily injury might be occasioned by a co-venturer acting with murderous intention and he or she, with that awareness, continues to participate in the agreed criminal enterprise" (at [1]). This reflects the very position that was abandoned in *Jogee* [2016] UKSC 8; [2016] 2 W.L.R. 681 *Ruddock v The Queen* UKPC 7 as a "wrong turn" of the English common law.

The three appellants and others had spent the evening together drinking; two of them went out to buy drugs and, on their way back, ended up in a ferocious argument with two local residents. Upon hearing of the altercation, a group including the three appellants decided to confront the residents, equipped with various weapons and instruments. A fight ensued during which one resident was stabbed to death and another seriously injured. Although the fatal injury was inflicted by another member of the appellants' group, the appellants were convicted of murder as secondary parties. Appealing in the wake of *Jogee*, they sought to challenge (amongst other grounds for appeal) the Australian equivalent of PAL as a possible but unsound basis for their conviction.

Five of the seven Justices hearing the appeal (French C.J., Kiefel, Bell, Nettle and Gordon JJ.) found similar arguments of policy and principle that had persuaded the UKSC to abandon PAL in *Jogee* unpersuasive in the Australian context (although the appeal succeeded on other grounds). The majority further concluded that the doctrine should not be altered to require "foresight of probability of the commission of the incidental offence" (at [43]). Keane J. added a separate judgment in agreement; only Gageler J. dissented.

This clear 6:1 affirmation of PAL follows unsuccessful challenges before the HCA in *McAuliffe* [1995] HCA 37; (1995) 183 C.L.R. 108 and *Clayton* [2006] HCA 58; (2006) 81 A.L.J.R. 439. While, on those earlier occasions, the continued existence of PAL in England/Wales and other jurisdictions favoured retention of the doctrine, the HCA has now emphasised that it simply does not agree with criticisms of over-criminalisation. This is most clearly exemplified by the majority's view that a party who expressly opposes a foreseen possible infliction of violence but still continues to participate in the criminal enterprise is morally and legally culpable of murder (at [38]). This contrasts starkly with the English position after *Jogee* where both moral and legal responsibility for murder would be denied in similar circumstances: as the HCA rightly observed, under the law of accessory liability as restated in *Jogee*, an accessory who disagrees with the infliction of harm would not be guilty of murder for lack of conditional intent that the victim be subjected to violence (at [38]).

The HCA was outspoken in its rejection of the UKSC's conclusion that the appropriate *mens rea* for secondary liability is intention, which it

portrayed as a policy-decision (at [32]). It identified six broad reasons for keeping the law as it is. First, it rejected claims of over-criminalisation as unfounded (at [38]). Secondly, following the view that PAL is an independent type of secondary liability rather than a sub-species of accessory liability, it reasoned that anomalies in liability between secondary and primary parties are to be explained by the particular nature of PAL (without explaining this further) (at [34]). Thirdly, referring to difficulties in proving individual contributions to concerted action (at [35]–[36]), the majority was swayed by the same practical concerns that had persuaded the House of Lords in *Powell* [1999] 1 A.C. 1 to uphold PAL but which the UKSC had found unpersuasive in *Jogee*. Indeed, the majority in *Miller* contradicted *Jogee* when it asserted that *Powell* was thorough in its consideration and rejection of arguments in favour of changing the law (at [40]). Fourthly, the HCA disagreed that the doctrine makes trials unduly complex (at [40]). Fifthly, the High Court considered it "undesirable" to alter PAL without reviewing the law of homicide and secondary liability generally (at [40]–[41]). Finally, it regarded judge-made reform inappropriate against a background of legislative interventions and reform efforts in various Australian states (at [42]–[43]).

Although, admittedly, the case for abolition appears less pressing in the Australian context where PAL remains part of the common law in South Australia and New South Wales only, none of the reasons cited in favour of retaining the doctrine was particularly well sustained. Indeed, the majority did little more than reassert well-rehearsed arguments in favour of PAL, without really engaging with counter-arguments.

Further grounds for keeping PAL were put forward by Keane J. in a separate opinion. Although his attempts to justify PAL on agency-based reasoning fail to convince – it is not self-evident that "each participant [in a joint criminal enterprise] also necessarily authorises those acts which he or she foresees as possible incidents of carrying out the enterprise" (at [139]) – there is something to be said for his observation that "to insist [in *Jogee*] that the liability of participants in a joint criminal enterprise be analysed exclusively in terms of accessorial liability" (at [139]) is problematic. Keane J. had a point also when he called into doubt the wisdom of treating those who commit the *actus reus* of incidental crimes inevitably as principal offenders, to the exclusion of others involved in the original enterprise (at [140]–[141]). Prime movers are not necessarily identifiable only by contributions to the *actus reus*, as the common law acknowledges in the context of innocent agency. It might be time to reconsider the rigid and narrow concept of joint principals to address some of the concerns that led Keane J. to conclude that PAL should remain part of Australian common law. Our understanding of what makes parties co-perpetrators rather than accessories remains undeveloped and under-theorised, and this may be

one less articulated reason why PAL with its connotations of a culpability that transcends subordinate ideas of aiding and abetting remains attractive.

Gageler J., who dissented on the issue of whether to bring Australian common law in line with *Jogee*, carefully examined and dissected arguments of principle, pragmatism and policy on both sides. Captivatingly written, his dissenting opinion exposed the fallacy of PAL orthodoxy as endorsed by the majority judgment with great clarity: assertions that culpability lies in the continued participation in the joint enterprise with foresight of the incidental crime simply cannot overcome the fact that, in the end, liability is still imposed on the basis of mere "foresight of the possibility of the primary party acting with intent" (at [120]).

Gageler J. strongly disagreed with the majority that PAL is morally warranted and any incongruity in liability between principal and secondary party justified: to his mind, criticisms of anomaly and moral disconnect remained "unanswerable" (at [111]–[112]). He agreed with *Jogee* that the phenomenon of escalating group violence does not without more furnish support for PAL, emphasising that Kirby J.'s concerns in *Clayton* about punishing vulnerable defendants who find themselves "in the wrong place at the wrong time in the wrong company" remain unresolved (at [125]).

Interestingly, the dissenter was unswayed by floodgate concerns that so clearly exercised the UKSC in *Jogee* and fears of undermining the public's trust in the legal system were PAL to be declared an error that persisted for 20-odd years in Australia, concluding that "where personal liberty is at stake . . . it is better that this Court be 'ultimately right' than that it be 'persistently wrong'" (at [128]).

While the formidable dissent exposes the majority's reasons for keeping PAL as weak, the majority was rightly sceptical of the prominence given in *Jogee* to the concept of conditional intent (see [21], [38]). Conditional intent is a red herring; the concept is neither new (as noted by Gageler J. at [89]), nor particularly helpful: an intent contingent upon the existence of certain facts still requires proof of full-blown intent, namely purpose or foresight that the prohibited consequence is virtually certain to occur.

Whereas foresight sets the threshold of liability indefensibly low in certain murder cases, demanding full-blown intention is beginning to look a step too far in the opposite direction, as *Miller* demonstrates. The HCA was clearly concerned that adopting the approach in *Jogee* means restricting liability for incidental crimes to situations where "the incidental offence form[s] part of the parties' common purpose should the occasion arise" (at [11]). *Miller* (which has since been endorsed by *HKSAR v Chan Kam Shing* [2016] HKCFA 87 for Hong Kong law) thus signifies that we may need to find a middle ground between foresight and full-blown intention to deal with the phenomenon of incidental crimes effectively across common law jurisdictions.

Although the meaning of authorisation has never been properly worked out, *Jogee*, which clearly favours an intention-based approach to assessing the culpability of secondary parties for incidental crimes, fleetingly associated the intent to assist or encourage with authorisation (in [66]). Maybe the latter can come to the rescue and help us devise a compromise definition of intention that is acceptable to jurisdictions which, like the HCA, reject *Jogee* as setting the bar for liability for murder intolerably high. Much will depend on how post-*Jogee* cases will flesh out the as yet undefined requirement of (conditional) intent to assist or encourage incidental crimes.

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REPUDIATORY BREACH: INABILITY, ELECTION AND DISCHARGE

STUDENTS – and indeed judges – of the law of contract have been sorely tried by *White & Carter (Councils) Ltd. v McGregor* [1962] A.C. 413. Mercifully, other propositions about the breach and discharge of contracts seem elementary.

Where circumstances change so radically that the contract can no longer be performed, it may be frustrated. Frustration discharges the contract "forthwith, without more and automatically" (*Hirji Mulji v Cheong Yue SS Co. Ltd.* [1926] A.C. 497, 505, per Lord Sumner). But frustration must be the product of external forces; it cannot stem from the actions of either party. A party that renders the contract incapable of performance will rather be held in repudiatory breach. Repudiation encompasses the promisor's *inability* to perform, in addition to "renunciation", namely a refusal or unwillingness to perform. But it is trite law that repudiation does not automatically bring the contract to an end (cf. frustration). The innocent party is given the option either to accept the repudiation (bringing the contract to an end) or to reject it (thereby affirming the contract). In the latter case (affirmation), the original repudiation has no effect. In the *White & Carter* case, the House of Lords confirmed the right of affirmation. The precise degree of any limits on that right have subsequently proved controversial (to say the least).

This question was again aired in *MSC Mediterranean Shipping Co. SA v Cottonex Anstalt* [2016] EWCA Civ 789; [2016] 2 Lloyd's Rep. 494. Ultimately, the court did not rule on the *White & Carter* point. Their reasons for holding that it did not arise create doubts about the supposedly trite propositions rehearsed in the previous paragraph.